CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 71

H. C. JONES, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

THE LIBERTY GLASS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 12, 1947
CERTIORARI GRANTED JUNE 2, 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 71

H. C. JONES, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

THE LIBERTY GLASS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Tenth Circuit	A	
Caption [omitted in printing]	A	1
Record from D. C. U. S., Western District of Oklahoma	1	1
Complaint	1	1
Exhibit A—Claim for refund	4	3
Exhibit B—Letter disallowing claim for refund	13	8
Answer	15	9
Motion to dismiss	16	10
Stipulation of facts	16	11
Opinion, Vaught, J.	18	12
Judgment	24	17
Notice of appeal	25	18
Appellant's designation of record on appeal	26	18
Statement of points relied on	27	19
Clerk's certificate [omitted in printing]	28	20
Record entry: Cause argued and submitted	29	20
Opinion, Bratton, J.	29	20
Dissenting opinion, Huxman, J.	32	23
Judgment	36	27
Clerk's note re mandate	36	27
Clerk's certificate [omitted in printing]	36	27
Order allowing certiorari	37	28

757300—47——1

(Caption omitted.)

1 In the United States District Court in and for the Western District of Oklahoma

No. 1724

THE LIBERTY GLASS COMPANY, PLAINTIFF

v.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE, DEFENDENT

Complaint

Filed November 3, 1944

Comes now the Liberty Glass Company, plaintiff herein, and shows to this court as follows:

That it is a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Sapulpa, Creek County, Oklahoma.

That the defendant is the duly appointed, qualified and acting Collector of Internal Revenue in the State of Oklahoma.

That on or about the 15th day of June 1939, your plaintiff filed with this defendant its income tax return for the year 1938, after having secured an extension of three months from March 15, 1939, in which to file same.

That said tax return so filed showed a taxable net income for the year 1938 in the sum of $9,058.90, with tax due thereon in the sum of $1,193.25; that during the year 1939 plaintiff paid said $1,193.25 in the manner and on the dates as set out in Exhibit "A" attached to this Complaint, which exhibit is a copy of the claim plaintiff filed with the defendant Collector of Internal Revenue, and which will be hereinafter referred to in more detail.

2 That in November, 1939 one Thomas S. Depew, Internal Revenue Agent, made an examination of the 1939 return of this plaintiff and made a report that the taxable income of this plaintiff for the year 1938 was $10,191.29, which resulted in an additional tax of $158.53 assessed against this plaintiff, and which plaintiff paid.

That in November, 1940 a re-examination was made of the 1938 return filed by this plaintiff by Carl E. Latta, a revenue agent, and his report was dated December 26, 1940, in which report he found that during the year 1938 this plaintiff had a taxable net income of $42,139.48, which resulted in an assessment in the sum of $7,992.59, and after deducting the amounts previously paid, as hereinabove set out, left due an additional tax for said

year in the sum of $6,649.81, which amount was paid by this plaintiff on the 8th day of March, 1941.

That the report and computation of tax made by said Carl E. Latta, hereinabove set out, was erroneous and illegal, for the reason that said Carl E. Latta failed to allow any credit for the money used to retire indebtedness of The Liberty Glass Company in the sum of $75,191.78, and said Liberty Glass Company, this plaintiff, was entitled to a credit of 2½% of $42,138.78, of $1,053.49; that in making said assessment said agent, Carl E. Latta failed to give credit for the amount used to retire indebtedness after the taxable income of The Liberty Glass Company had been raised to an amount in excess of $25,000.00.

That by so doing, the sum of $1,053.49 was not only illegal, it was not an assessment in the prescribed form, and was not a tax, but it was an illegal extraction of a payment from the taxpayer; and the recovery thereof should be controlled by Section 3313 of the Internal Revenue Code and should not be controlled by Section 322 of said Internal Revenue Code.

That your plaintiff relied upon the correctness of the report made by said Carl E. Latta and paid the amount as shown thereby; that thereafter your plaintiff discovered the erroneous and illegal payment so made by plaintiff, and on the 30th day of March, 1944, plaintiff filed with defendant, Collector of Internal Revenue, a claim for refund in the sum of $1,053.49; that said claim
3 was filed upon forms and in the manner prescribed by the Internal Revenue Department, same being Form No. 843, which claim had attached thereto a full and complete statement of the computations heretofore mentioned in this Complaint, together with a statement of all the transactions; that to said claim there were attached Schedules 1 and 2, which set out a full and complete statement of the transactions on indebtedness of The Liberty Glass Company, plaintiff, for the year 1938, and a detailed statement of the amounts used to retire indebtedness in said year 1938; that a copy of said claim, with a statement of the transactions and Schedules 1 and 2 attached is hereto attached, marked Exhibit "A" and made a part hereof.

That thereafter, and on or about June 23, 1944, the Commissioner of Internal Revenue, acting by and through Norman D. Conn, Deputy Commissioner, disallowed said claim, on the only grounds and for the sole reason that same was not filed within the time provided by the laws of the United States; that a copy of said letter is attached hereto, marked Exhibit "B" and made a part hereof.

That by reason of the matters hereinabove set out, this defendant is indebted to your plaintiff in the sum of $1,053.49, with interest thereon from the 8th day of March, 1941.

Wherefore, your plaintiff, The Liberty Glass Company, prays

gment against defendant, H. C. Jones, Collector of Internal Revenue for the State of Oklahoma, in said sum of $1,053.49, with interest therein from the 8th day of March 1941, together with the costs of this action.

THE LIBERTY GLASS COMPANY,
Plaintiff.

By EARL FOSTER, *Its Attorney,*

4 *Exhibit A to complaint*

Claim

To be Filed with the Collector Where Assessment was made or Tax Paid.

[Collector's stamp (Date received)]

The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Oklahoma, County of Creek, ss:

[Type or Print.]

Name of taxpayer or purchaser of stamps The Liberty Glass Company.

Business address: Collins Bldg., Sapulpa, Oklahoma.

Residence.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Oklahoma City.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1 1938, to Dec. 31, 1938.
3. Character of assessment or tax. Income Tax.
4. Amount of assessment, $7,992.59; dates of payment 1939 $1,193.25; 1940 $158.53 & 3-8-41 $6,640.81.
5. Date stamps were purchased from the Government.
6. Amount to be refunded $1,053.49
7. Amount to be abated (not applicable to income or estate taxes) ..... $.....

5 8. The time within which this claim may be legally filed expires, under Section 3313 of the Internal Revenue Code of 19.. on March 8, 1945.

The deponent verily believes that this claim should be allowed for the following reasons:

GEORGE F. COLLINS, JR.,
President.

See statements attached.

Sworn to and subscribed before me this 28th day of March 1944. Catherine Carman, Notary. My comm. expires 5/4/44. (Seal.).

The Liberty Glass Company, Sapulpa, Oklahoma

Statement of Facts Concerning Assessment and Payment of Illegal Taxes for 1938

The Federal income tax return for The Liberty Glass Company for 1938 was filed on or about June 15, 1939 because of an extension of time granted of three months from March 15, 1939.

The return filed on June 15, 1939 showed taxable net income of $9,058.99 and a tax due of $1,193.25. Schedule "B" of the return showed the computation of tax as follows:

Line 12: portion of income not in excess of $5,000.00 at 12%	$625.00
Line 13: portion of income in excess of $5,000.00 at 14%	568.25
	1,193.25

The foregoing computation was correct for corporation showing net incomes of less than $25,000.00.

The tax of $1,193.25 was paid as follows:

6	March 15, 1939 (with tentative return)	$500.00
	June 15, 1939	96.62
	Sept. 15, 1939	298.31
	Dec. 15, 1939	298.32
		1,193.25

In November 1939, Internal Revenue Agent Thomas S. Depew, made an examination of the return for 1938. That report dated November 16, 1939, made the following changes:

Income reported on original return		$9,058.99
Add:		
Novelty sales not reported	$1,212.66	
Less: additional contributions allowable	80.28	
		1,132.38
		10,191.28

As a result of the foregoing an additional tax of $158.53 was assessed and paid.

In November of 1940 a re-examination was made of the 1938 return by Revenue Agent, Carl E. Latta. This report was dated December 26, 1940, and changed the taxable income for 1938 as follows:

Income per previous revenue agents report		$10,191.28
Add:		
Stockholders salaries disallowed	$10,100.00	
Loss on Furnace #2 disallowed	21,934.82	
	32,034.82	
Less—additional contributions allowable	86.62	
		31,948.20
Amended taxable income (2nd examination)		42,139.48

7 Internal Revenue Agent Carl E. Latta in his report computed the income tax as follows:

Amended taxable income	$42,139.48
Tentative tax at 19%	8,006.50
Less:	
2½ of dividend paid of $556.50	13.91
2½% of amounts used to retire indebtedness	Nil
Total tax under general rule	7,992.59

The report and computation of tax failed to allow any credit against the tax of 2½% of sums used to retire indebtedness, yet $75,191.78 was used to retire indebtedness in 1938. To that extent the tax computation was erroneous and illegal and not in accordance with the Internal Revenue Code. The consequence was that an assessment was made of a tax that was in fact not a tax. The amount is 2½% of $42,139.48 or $1,053.49. The amount of refund hereby requested is for $1,053.49 plus legal interest, as a return of an illegal assessment and collection of an amount not in fact a tax. The Revenue Agent made an erroneous and illegal assessment and the amount of $1,053.49 was erroneously, illegally, and wrongfully assessed and collected from The Liberty Glass Company. The Agent failed to recognize that after he had raised the taxable income in excess of $25,000.00 the tax computation was different than for returns made where the income is less than $25,000.00.

The taxpayer paid the additional assessment of tax determined by the Revenue Agent's Report dated December 26, 1940 on March 8, 1941. The amount paid was computed as follows:

Tax per report of December 26, 1940		$7,992.59
Less previously paid:		
Original return	$1,193.25	
1st Revenue Agent's Report	158.53	1,351.78
Additional tax paid		6,840.81

8 Had the tax been correctly computed the additional tax to be paid would have been $5,587.32 as undernoted:

Additional tax paid	$6,640.81
Less error in computation	1,053.49
Amount which should have been assessed	5,587.32

The taxpayer has filed a claim for refund of the same kind of error for the year 1939 of $197.78 and with that claim was submitted details of amounts used to retire indebtedness for the year 1939. The claim has been examined and found correct. The agent making that examination requested, and there was furnished, the information of sums used to retire indebtedness existing as of December 31, 1937.

The taxpayer relies on section 3313 of the Internal Revenue Code, as a basis for recovery of the illegal sum assessed and paid as an income tax, when in fact such sum was neither an income tax nor a just debt of the taxpayer to the Treasury Department of the United States.

The taxpayer further relies upon U. S. v. Lederer Terminal Warehouse Co. C. C. A. 6th District decided November 30, 1943. (1943 P H 62,901). In that case the Court decided that section 3313 properly applies to erroneous or illegal collections. It is contended that the instant illegal collection of a sum erroneously computed by the Internal Revenue Agent as an income tax, when none existed for that sum, from The Liberty Glass Company should now be refunded and recovered, with legal interest.

The amounts used to retire indebtedness in 1938 of $75,191.78 are detailed in appended schedules "1" and "2".

Respectfully submitted.

GEORGE F. COLLINS, Jr.,
President,
THE LIBERTY GLASS COMPANY.

9 SCHEDULE NO. 1.—*The Liberty Glass Company, Sapulpa, Oklahoma*

STATEMENT OF TRANSACTIONS ON INDEBTEDNESS FOR THE YEAR 1938

	Balance Dec. 31, 1937	New borrowing	Payments on indebtedness		Balance Dec. 31, 1938
			Old (1937)	New	
Notes and Trade Acceptances Payable:					
Lynch Corporation	$5,500.00	$47,800.00	$5,500.00	$13,000.00	$34,800.00
Corhart Refractories	5,836.86	9,742.93	5,836.86		9,742.93
Clark Darland	596.82		596.82		
Knope-Coleman	20,000.00		5,000.00		15,000.00
Diamond Alkali	10,000.00	63,688.10	10,000.00	40,000.00	23,688.10
International Business Machines	106.04		106.04		
Hartford Empire Co	577.45		577.45		
Independent Gravel	469.11	4,496.62	469.11	4,496.62	
First National Bank		35,000.00			35,000.00
American National Bank		10,000.00		10,000.00	
Laclede Christy		14,100.93		5,024.72	9,076.21
Other		475.00		475.00	
	43,086.28	185,303.58	28,086.28	72,996.34	127,307.24
Lawrence Warehouse Contracts:					
With American National Bank	19,999.30	44,859.06	19,999.30	25,977.05	18,882.01
With Commerce Trust Company	24,195.00	52,767.55	24,195.00	18,264.47	34,503.08
	44,194.30	97,626.61	44,194.30	44,241.52	53,385.09
Three Rivers Purchase Contract	16,253.40		2,911.20		13,342.20
Grand Total	103,533.98	282,930.19	75,191.78	117,237.86	194,034.53

11 SCHEDULE 2. The Liberty Glass Company, Sapulpa, Oklahoma

Details of Amounts Used to Retire Indebtedness in 1938

Indebtedness incurred prior to December 31, 1937, and in part, retired during the year ended December 31, 1938, as computed hereunder:

Name of creditor—Lynch Corporation		
1 Note dated January 13, 1937		$5,500.00
Note paid in eleven monthly installments of $500.00 each beginning January 13, 1938		5,500.00
Name of Creditor—Corhart Refractories.		
1 Note dated January 1, 1937		5,836.86
Note paid in nine monthly installments of $84.54 each, beginning January 1, 1938		5,836.86
Name of Creditor—Clark-Darland Hardware Co.		596.82
1 Note dated September 20, 1937, payable September 20, 1938		596.82
Note paid September 20, 1938		596.82
Name of Creditor—Knope-Coleman.		
4 Notes dated September 20, 1937 of $5,000.00 each, payable:		
Note #1 September 20, 1938	$5,000.00	
Note #2 September 20, 1939	5,000.00	
Note #3 September 20, 1940	5,000.00	
Note #4 September 20, 1941	5,000.00	
Note #1 paid September 20, 1938 (others paid when due)	5,000.00	
Name of Creditor—Diamond Alkali Company.		
12 2 Notes dated November 15, 1937 of $5,000.00 each payable:		
Note #1 January 14, 1938	$5,000.00	
Note #2 February 13, 1938	5,000.00	
Notes paid when due.		
Name of Creditor—International Business Machine Co.		
1 Note		106.04
Note paid in monthly installments of $53.02 each beginning January 3, 1938		106.04
Name of Creditor—Hartford Empire Co.		
1 Note dated January 2, 1937		577.45
Note paid January 2, 1938		577.45
Name of Creditor—Independent Gravel Co.		
1 Note dated September 10, 1937		469.11
Note paid January 8, 1938		469.11
Name of Creditor—American National Bank, Sapulpa, Oklahoma		
Balance of Note at December 31, 1937, secured by Warehouse Receipts		19,999.30
Note paid on following dates:		
January 1938		7,497.70
February 1938		7,243.20
March 1938		5,258.40
Name of Creditor—Commerce Trust Company, Kansas City, Missouri		
Balance of Note at December 31, 1937, secured by Warehouse Receipts		24,195.00
Note paid on following dates:		
January 1938		1,701.80
February 1938		3,656.40
March 1938		6,940.70
April 1938		6,805.60
May 1938		14,456.25
August 1938		634.25

13 Name of Creditor—Henderson Coquet Receiver for Three Rivers Glass Co

Note dated June 23, 1933, for $44,000.00 due and payable in installments of $242.60 each month on principal plus accrued interest.

Payments on Note:	
Prior to December 31, 1937	27,746.60
In year 1938 (twelve installments of $242.60)	2,911.20
Total paid on indebtedness outstanding December 31, 1937:	
Lynch Corporation	5,500.00
Corhart Refractories	5,836.86
Clark-Darland Hardware Co	596.82
Knope-Coleman	5,000.00
International Business Machines Co	106.04
Hartford Empire Co	577.45
Independent Gravel Co	469.11
American National Bank, Sapulpa	19,999.30
Diamond Alkali Company	10,000.00
Commerce Trust Co	24,195.00
Three River Glass Co	2,911.20
Total	75,191.78

Exhibit B to complaint

Treasury Department

Office of Commissioner of Internal Revenue.
Address Reply to Commissioner of Internal Revenue and

Refer to IT:C1:CC:3-GPM.

Washington 25, June 23, 1944.

The Liberty Glass Company, Collins Building, Sapulpa, Oklahoma.

Gentlemen: Reference is made to your claim for refund
14 of income tax in the amount of $1,053.49 in which you contend that the tax assessed for the year 1938 was erroneously or illegally assessed and under Section 3313 of the Internal Revenue Code, you have four years after payment of such tax within which to file a claim.

Section 3313—period of limitation upon refunds and credits, provides:

"All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty or sum. The amount of the refund (in the case of taxes other than income,

war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

It will be observed that this section specifically exempts from its application income, war-profits, excess profits, estate and gift taxes. The decision in the case of U. S. v. Lederer Terminal Warehouse Company cited by you, is not being followed by the Bureau.

In view of the foregoing, your claim is disallowed and this notice is sent you by registered mail in accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code.

By direction of the Commissioner:

Very truly yours,

NORMAN D. CONN,
Deputy Commissioner.

(File endorsement omitted.)

15 In United States District Court

Answer

Filed March 2, 1945

Comes now the defendant, H. C. Jones, Collector of Internal Revenue for the District of Oklahoma, by his attorney, Charles E. Dierker, United States Attorney for the Western District of Oklahoma, and for his answer to the complaint of the plaintiff herein, admits, denies, and alleges as follows:

1. Admits the allegations contained in the first paragraph of allegations in the complaint.

2. Admits the allegations contained in the second paragraph of allegations in the complaint.

3. Admits the allegations contained in the third paragraph of allegations in the complaint.

4. Admits the allegations contained in the fourth paragraph of allegations in the complaint, except that it is alleged that the payment of $500.00 was made on March 18, 1939 instead of on March 15, 1939.

5. Admits the allegations contained in the fifth paragraph of the complaint.

6. Admits the allegations contained in the sixth paragraph of the complaint.

7. Denies the allegations contained in the seventh paragraph of the complaint, except that it is admitted that in the computation

of the additional tax of $6,640.81, no credit was allowed for amounts asserted to have been used to retire indebtedness.

8. Denies the allegations contained in the eighth paragraph of the complaint.

9. Denies the allegations contained in the ninth paragraph of the complaint, except that it is admitted that the plaintiff paid the tax in the amount of $1,023.49 and that the plaintiff filed a claim for refund as alleged, and that the claim was rejected by the Commissioner, and denies the allegations contained in the claim for refund and attached schedules.

Wherefore, The defendant demands judgment dismiss-
16 ing the complaint, together with the costs and disbursements of the action.

CHARLES E. DIERKER,
United States Attorney,
Attorney for Defendant.

I hereby certify that a copy of the foregoing answer was on this 2nd day of March, 1945 mailed to Earl Foster, First National Bank Bldg., Oklahoma City, Oklahoma, attorney of record for plaintiff.

CHARLES E. DIERKER.

(File endorsement omitted.)

In United States District Court

Defendant's motion to dismiss plaintiff's action

Filed December 4, 1945

Comes now the defendant and moves the Court to dismiss this action for the reason that the complaint herein fails to state a claim upon which any relief can be granted, in that the complaint shows upon its face that the taxpayer filed no timely claim for refund and therefore the complaint fails to state any claim over which this Court would have jurisdiction. Judgment should therefore be for the defendant upon the pleadings.

H C. JONES,
Collector of Internal Revenue,
By CHARLES E. DIERKER,
United States District Attorney,
Attorney for Defendant.

(File endorsement omitted.)

In United States District Court

Stipulation of facts

Filed December 4, 1945

The following facts are stipulated to by plaintiff, The Liberty Glass Company, and defendant, H. C. Jones, Collector of Internal Revenue, to-wit:

(1) That The Liberty Glass Company is a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Sapulpa, Creek County, Oklahoma.

(2) That the defendant is the duly appointed, qualified, and acting Collector of Internal Revenue in the State of Oklahoma.

17 (3) That under the applicable revenue law, the plaintiff was required to file a corporation income and excess profits tax return for the taxable year 1938. That on or about the 15th day of June 1939, plaintiff filed with defendant its corporation income and excess tax return for the year 1939, after having secured an extension of three months from March 15, 1939.

(4) That said tax return showed a taxable net income for the year 1938 in the sum of $9,058.90, with tax due thereon in the sum of $1,193.25; that during the year 1939 plaintiff paid said $1,193.25 in the manner and on the dates as set out in Exhibit "A" attached to the Complaint, except that the payment of $500.00 shown as paid on March 15, 1939, was paid March 18, 1939, which Exhibit "A" is a copy of the claim plaintiff filed with defendant Collector of Internal Revenue, which will be hereinafter referred to.

(5) That in November 1939, Thomas S. Depew, Internal Revenue Agent, made an examination of said 1938 return of this plaintiff above referred to and made a report that the taxable income of the plaintiff for the year 1938 was $10,191.28, which resulted in an additional tax of $158.5[illegible] assessed against plaintiff, and which plaintiff paid.

(6) That in November 1940, a re-examination was made of the 1938 return filed by plaintiff by Carl E. Latta, a revenue agent and his report was dated December 26, 1940, in which report he found that during the year 1938 plaintiff had a taxable net income of $42,139.48 which resulted in an assessment in the sum of $7,992.59, and after deducting the amounts previously paid, as hereinabove set out, left due an additional tax for said year in the sum of $6,640.81, which amount was paid by plaintiff on

March 8, 1941, and that in case judgment shall be rendered for plaintiff that plaintiff be entitled to judgment in the sum of $1,053.49, with interest as provided by law, same being two and a half (2½) per centum of the amount of its net income in the sum of $42,139.48.

(7) That the report and computation of tax made by said Carl E. Latta failed to allow any credit for the money used to retire indebtedness of The Liberty Glass Company, and
18 that said Liberty Glass Company retired indebtedness in the year 1938 in the sum of $75,191.78, which is shown on Schedule 1 and Schedule 2 of Exhibit "A" of plaintiff's Complaint, which retired indebtedness comes within Sec. 13 & 27 of the Revenue Act of 1938, it being agreed that the statements as to the retirement of indebtedness as shown on Schedules 1 and 2 of Exhibit "A" are correct.

(8) That the claim so filed was rejected by the Commissioner of Internal Revenue and refund denied pursuant to a letter signed by Norman D. Conn, under date of June 24, 1944, true and correct copy of said letter being attached to the Complaint as Exhibit "B".

(9) That Exhibit "A" attached to plaintiff's Complaint is a true and correct copy of the Claim duly filed with the defendant Collector of Internal Revenue for the State of Oklahoma on the 30th day of March, 1944.

(10) That the computations made in said Exhibit "A" as to the amount charged and the amounts paid are all correct.

(11) That the above and foregoing constitute all the facts necessary for a proper hearing of this matter; and that the same may be submitted to the court with this Stipulation of Facts and a judgment rendered according to the law governing such cases.

THE LIBERTY GLASS COMPANY,
By EARL FOSTER, *Its Attorney.*
H. C. JONES,
Collector of Internal Revenue.
By CHARLES E. DIERKER,
United States District Attorney and Attorney for Defendant.

(File endorsement omitted.)

In United States District Court

Opinion

Filed April 3, 1946

The Liberty Glass Company, a corporation brings this action against H. C. Jones, Collector of Internal Revenue, seeking to

recover the sum of $1,053.49, with interest from March 8, 1941, for taxes paid by it upon what it claims was an "illegal and erroneous" assessment.

19 The defendant has filed a motion to dismiss for the reason that the complaint "fails to state a claim upon which any relief can be granted, in that the complaint shows upon its face that the taxpayer filed no timely claim for refund and therefore the complaint fails to state any claim over which this court would have jurisdiction."

The parties have filed a stipulation of facts, the pertinent parts of which are as follows:

"(3) That under the applicable revenue law, the plaintiff was required to file a corporation income and excess profits tax return for the taxable year 1938. That on or about the 15th day of June, 1939, plaintiff filed with defendant its corporation income and excess profits tax return for the year 1938, after having secured an extension of three months from March 15, 1939.

"(4) That said tax return showed a taxable net income for the year 1938 in the sum of $9,058.90, with tax due thereon in the sum of $1,193.25; that during the year 1939 plaintiff paid said $1,193.25 in the manner and on the dates as set out in Exhibit 'A' attached to the complaint, except that the payment of $500.00 shown as paid on March 15, 1939, was paid March 18, 1939, which Exhibit 'A' is a copy of the claim plaintiff filed with defendant Collector of Internal Revenue, which will be hereinafter referred to.

"(5) That in November 1939, Thomas S. Depew, Internal Revenue Agent, made an examination of said 1938 return of this plaintiff above referred to and made a report that the taxable income of the plaintiff for the year 1939 was $10,191.28, which resulted in an additional tax of $158.53 assessed against plaintiff, and which plaintiff paid.

"(6) That in November 1940, a re-examination was made of the 1938 return filed by plaintiff by Carl E. Latta, a revenue agent, and his report was dated December 26, 1940, in which report he found that during the year 1938 plaintiff had a taxable net income of $42,139.48, which resulted in an assessment in the sum of $7,992.59, and after deducting the amounts previously paid, as hereinabove set out, left due an additional tax for said year in the sum of $6,640.81, which amount was paid by plaintiff on
20 March 8, 1941, and that in case judgment shall be rendered for plaintiff that plaintiff be entitled to judgment in the sum of $1,053.49, with interest as provided by law, same being two and a half (2½) per centum of the amount of its net income in the sum of $42,139.48.

"(7) That the report and computation of tax made by said Carl

E. Latta failed to allow any credit for the money used to retire indebtedness of The Liberty Glass Company, and that said Liberty Glass Company retired indebtedness in the year 1938 in the sum of $75,191.78, which is shown on Schedule 1 and Schedule 2 of Exhibit 'A' of plaintiff's complaint, which retired indebtedness comes within Sec. 13 & 27 of the Revenue Act of 1938, it being agreed that the statements as to the retirement of indebtedness so shown on Schedules 1 and 2 of Exhibit 'A' are correct.

"(8) That the claim so filed was rejected by the Commissioner of Internal Revenue and refund denied pursuant to a letter signed by Norman D. Conn, under date of June 24, 1944, true and correct copy of said letter being attached to the complaint as Exhibit 'B'.

"(9) That Exhibit 'A' attached to plaintiff's complaint is a true and correct copy of the claim duly filed with the defendant Collector of Internal Revenue for the State of Oklahoma on the 30th day of March, 1944.

"(10) That the computations made in said Exhibit 'A' as to the amount charged and the amounts paid are all correct.

"(11) That the above and foregoing constitute all the facts necessary for a proper hearing of this matter; and that the same may be submitted to the court with this stipulation of facts and a judgment rendered according to the law governing such cases."

It will be observed that in paragraph 6 of the stipulation the tax was paid in a sum found to be due in a rechecking of the original return, which is a sum vastly in excess of the amount paid on the original return. The sum was paid on March 8, 1941, and it is stipulated "that in case judgment shall be rendered for
21 plaintiff that plaintiff be entitled to judgment in the sum of $1,053.49, with interest as provided by law, same being two and a half (2½) per centum of the amount of its net income in the sum of $42,139.48."

Paragraph 7 of the stipulation provides:

"That the report and computation of tax made by said Carl E. Latta failed to allow any credit for the money used to retire indebtedness of The Liberty Glass Company, and that said Liberty Glass Company retired indebtedness in the year 1938 in the sum of $75,191.78, which is shown on Schedule 1 and Schedule 2 of Exhibit 'A' of plaintiff's complaint, which retired indebtedness comes within Sec. 13 and 27 of the Revenue Act of 1938, it being agreed that the statements as to the retirement of indebtedness so shown on Schedules 1 and 2 of Exhibit 'A' are correct."

Paragraph 8 of the stipulation agrees that a claim was filed and was rejected by a letter of June 24, 1944, as shown by exhibit B of the complaint. The basis for the disallowance of the claim was that the statute of limitations had run against the claim.

The claimant contends that it comes within the provisions of Section 3313, Title 26 U. S. C., which is as follows:

"All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sums alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

22 The defendant contends that Title 26 U. S. C. Section 322 subsections (a) (1) and (b) (1), which read as follows, control:

"(A) Authorization (1) Overpayment. Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

(b) Limitation on allowance (1) Period of limitation. Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no refund is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

The interpretation of these statutes is decisive of the motion to dismiss and the judgment to be rendered.

The question as to which of these two statutes controls in such situations as we have here, is not a new one. In the following cases, the courts have had the question under consideration and, as I view the decisions, have in each instance held contrary to the contention advanced by the defendant.

Olsen v. United States, 32 F. Supp. 276 (S. D. Calif., March 19, 1940);

In re Tindle's Estate, 59 F. Supp. 667 (E. D. Penn., March 1, 1945);

Huntley v. Southern Oregon Sales, Inc., 102 2d 538 (C. C. A. 9, March 13, 1939);

United States v. The Lederer Terminal Warehouse Company, 139 F. 2d 679 (C. C. A. 6, Nov. 30, 1943.)

In The Lederer Terminal Warehouse Company Case, supra, the court concluded as follows:

23 "If two statutes present ambiguities, a reasonable interpretation should be adopted by the courts which will give consistent effect to the apparent intention of Congress. Statutes should not be read literally, when such readings leads to absurd results. They should be given 'a reasonable application consistent with their words and with the legislative purpose.' Haggar Company v. Helvering, supra, 308 U. S. 389, 394, 60 S. Ct. 337, 339, 84 L. Ed. 340.

"Congress evidently considered that less time would be required for the discovery of errors in tax returns resultant from *miscalculations* or mere overpayment than would be required to ascertain the *erroneous* or *illegal* nature of an *assessment*. Hence, the inference is logical that Congress intended to allow the taxpayer a longer time to determine whether he had been *erroneously* or *illegally assessed* than would be permitted him for the discovery of a *mere overpayment* of taxes, *assessed* and *collected upon a correct legal basis*. This would explain the longer time limitation provided by Congress in Section 3313 than that allowed in Section 322 of the Internal Revenue Code." (Emphasis supplied.)

It is only when two statutes present ambiguities that courts are concerned with the history of the legislation. If this was not the rule, courts would be engaged in continuous and unending controversies over disagreements as to what the legislators had in mind in framing the language of the statutes. But where the statutes do not present ambiguities, then the intent must be determined by the language of the statutes themselves. As I view these statutes, there is no ambiguity presented here. The purpose each of them is very clear. Section 322 deals with *overpayments* of any tax legally imposed, while Section 3313 deals with claims for credits or refunds claimed to have been paid on sums *alleged, to have been erroneously or illegally assessed or collected, or claims for any sum alleged to have been excessive or in any manner wrongfully collected*. The statute (Section 3313) clarifies its

24 intent by providing these words: "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." Clearly this must refer to Section 322 which provides a period of limitation on claims for *overpayment* on such taxes, of *three years* from the time the taxpayer filed his return or within *two years* from the time the tax was paid. The claim of the plaintiff is for a sum alleged to have been errone-

ously or illegally assessed and clearly is governed by the limitation so provided in Section 3313. To hold otherwise would be contrary to all of the well-considered cases above cited.

The motion to dismiss should be and is hereby overruled and judgment should be rendered for the plaintiff for the sum of $1053.49, with interest at two and a half per centum; as provided by the stipulation, from March 8, 1941.

Form of judgment, consistent with this opinion, may be submitted within ten days from this date.

EDGAR S. VAUGHT,
United States District Judge.

Dated this 3rd day of April 1946.
(File endorsement omitted.)

In United States District Court

Journal Entry of Judgment

Filed April 18, 1946

The above entitled matter came on to be heard before the undersigned judge of the United States District Court for the Western District of Oklahoma on the 4th day of December 1945, plaintiff appearing by its attorney, Earl Foster, and the defendant appearing by Charles E. Dierker, United States District attorney for the Western District of Oklahoma, and John W. Fisher, special assistant to the Attorney General; and both sides having announced ready for trial and having filed with the clerk a Stipulation of Facts, making it unnecessary to introduce oral testimony; and defendant having filed a Motion to Dismiss Complaint for the reason that same failed to state grounds upon which any relief could be granted; and the court having heard the argument of counsel; and defendant having requested that the court permit the filing of written briefs, which request was granted by the court, plaintiff was given until the 15th day of January 1946, within which to file its brief, and the defendant twenty days thereafter to answer;

Whereupon both sides having filed briefs pursuant thereto, and plaintiff having filed a supplemental brief; and the court having considered said briefs, on the 3rd day of April, 1946, filed with the clerk an opinion setting out his Findings of Fact and Conclusions of Law, finding that said Motion to Dismiss should be overruled, and that judgment should be rendered by the court for plaintiff, as prayed for in said Complaint;

It is Therefore Ordered, Adjudged, and Decreed by the Court that the Motion to Dismiss filed by the defendant herein be, and

the same is hereby, overruled, and that plaintiff be, and it is hereby, granted a judgment in the sum of One Thousand Fifty-three and 49/100 Dollars ($1,053.49), with interest as provided by law from March 8, 1941, and the costs of this action.

Dated this 18th day of April, 1946.

EDGAR S. VAUGHT,
Judge of the United States District Court for the Western District of Oklahoma.

(File endorsement omitted.)

In United States District Court

Notice of Appeal

Filed July 17, 1946

Notice is hereby given that H. C. Jones, Collector of Internal Revenue, defendant above named, hereby appeals to the Circuit Court of Appeals of the Tenth Circuit from the final judgment entered in this action on April 18, 1946, in favor of the
26 plaintiff-appellee, The Liberty Glass Company, and against the defendant-appellant H. C. Jones, Collector of Internal Revenue.

CHARLES E. DIERKER,
United States Attorney for the Western District of Oklahoma, Attorney for Appellant, H. C. Jones, Collector of Internal Revenue.

Copy of the above notice of appeal mailed Mr. Earl Foster, Atty., 1st Natl. Bldg., Okla. City, July 17, 1946. Margaret P. Blair, Deputy Clerk.

(File endorsement omitted.)

In United States District Court

Appellant's designation of contents of record on appeal

Filed July 19, 1946

The appellant in the above-entitled cause hereby designates the parts of the record to be contained in the record on this appeal, as follows:

1. Plaintiff's complaint.
2. Defendant's answer.

3. Defendant's motion to dismiss plaintiff's action.
4. Stipulation of facts.
5. Opinion.
6. Judgment.
7. Notice of appeal.
8. This designation.
9. Statement of points on which appellant intends to rely.

CHARLES E. DIERKER,
United States Attorney, Attorney for the Defendant.

I hereby certify that a copy of the foregoing Designation of Contents of Record on Appeal was on this 19th day of July, 1946, deposited in the United States Post Office at Oklahoma City, Oklahoma, in an official franked envelope addressed to Mr.
27 Earl Foster, Attorney at Law, State Capitol Bldg., Oklahoma City, Oklahoma, attorney of record for appellee.

CHARLES E. DIERKER,
United States Attorney.

(File endorsement omitted.)

In United States District Court

Statement of points on which appellant intends to rely

Filed July 19, 1946

The points on which appellant intends to rely on this appeal are as follows:

1. The District Court erred in holding that plaintiff's claim for refund is governed by the four year limitation provided in Section 3313 of the Internal Revenue Code instead of the two year limitation provided in Section 322 (b) (1) of the Internal Revenue Code.
2. The District Court erred in overruling the defendant's motion to dismiss the action.
3. The District Court erred in entering judgment for the plaintiff, and in failing to enter judgment for the defendant.

CHARLES E. DIERKER,
United States Attorney, Attorney for the Defendant.

I hereby certify that a copy of the foregoing Statement of Points Upon Which Appellant Intends to Rely was on this 19th day of July, 1946, deposited in the United States Post Office at Oklahoma City, Oklahoma, in an official franked envelope addressed to Mr.

Earl Foster, Attorney at Law, State Capitol Building, Oklahoma City, Oklahoma, attorney of record for appellee.

CHARLES E. DIERKER,
United States Attorney.

(File endorsement omitted.)

28 (Clerk's certificate to foregoing transcript omitted in printing.)

29 In United States Circuit Court of Appeals,
Tenth Circuit

Record entry: Cause argued and submitted

Fourth Day, November Term, Thursday, November 14th, A. D. 1946

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN, Circuit Judges

This cause came on to be heard, and was argued by counsel. S. Walter Shine, Esquire, appearing for appellant. Earl Foster, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

In United States Circuit Court of Appeals

S. Walter Shine, Special Assistant to the Attorney General (Sewall Key, Acting Assistant Attorney General, J. Louis Monarch and Frank J. Ready, Special Assistants to the Attorney General, and Charles E. Dierker, United States Attorney, were with him on the brief), for Appellant.

Earl Foster for Appellee.

Before PHILLIPS, BRATTON, and HUXMAN, Circuit Judges

Opinion

January 21, 1947

BRATTON, Circuit Judge: The Liberty Glass Company, a corporation, hereinafter referred to as the taxpayer, instituted this action against the Collector of Internal Revenue for the District of Oklahoma, hereinafter referred to as the collector, to recover the sum of $1,053.49, with interest, on the ground that it had been paid as income and excess-profits taxes pursuant to an erroneous and illegal deficiency assessment. The cause was submitted to the court on stipulated facts. It was stipulated that the taxpayer filed its return for the year 1938 and seasonably paid the taxes

shown therein; that two separate examinations were subsequently made of the return, each resulting in a deficiency assessment which was paid; that the last assessment failed to allow any credit for money used by the taxpayer during the taxable year to retire indebtedness; that such assessment was paid on March 8, 1941; that claim for refund was filed on March 30, 1944; and that the claim was rejected on the ground that it was not filed within the time required by law. It was further stipulated that if the taxpayer was entitled to recover, the judgment should be for $1,053.49, with interest. The court entered judgment for the taxpayer, and the collector appealed.

The question presented is whether it was necessary that the claim be filed within two years after payment, as required by section 322 of the Internal Revenue Code, 26 U. S. C. A. § 322; or within four years after the payment, as required by section 3313 of the Code, 26 U. S. C. A. § 3313. If the former, it was filed too late; if the latter, it was within time. Section 322 provides in material part that in case of an overpayment of any tax imposed by the chapter, the amount of such overpayment shall be credited against any income, war-profits or excess-profits tax then due from the taxpayer, that any balance shall be refunded to the taxpayer; and that a claim for the credit or refund must be filed within three years after the filing of the return or within two years after payment of the tax. Section 3313 provides in material part that all claims for the crediting or refunding of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, must be presented to the Commissioner within four years after payment of the tax.

By its express terms, section 322 has application to claims for overpayment of income, war-profits, or excess-profits taxes. It was intended to govern overpayments resulting from errors occurring in the preparation of the return, or in other somewhat similar circumstances. And by its express language, section 3313 has application to claims for the crediting or refunding of payments of internal revenue erroneously or illegally assessed. It was intended to govern where a deficiency assessment is erroneously or illegally made under pretended color of legal authority. The claim submitted by this taxpayer was not for a refund of an overpayment arising out of an error or mistake in the preparation of the return. Nothing of that kind entered into the situation. It was for money paid in liquidation of a deficiency assessment erroneously and illegally made under pretended color of legal authority. Therefore the time for the filing of the claim was fixed by section 3313. Huntley v. Southern Oregon Sales, Inc.,

102 F. (2d) 538; United States v. The Lederer Terminal Warehouse Co., 139 F. (2d) 669; Pennsylvania Co. v. United States, 152 F. (2d) 757, affirming 59 F. Supp. 667. See also Olsen v. United States, 32 F. Supp. 276; Godfrey v. United States, 61 F. Supp. 240; Noble v. Kavanagh, 66 F. Supp. 258.

Conceding that the cases just cited are against his contention and expressly challenging their correctness, it is the argument of the collector that by the exceptive provision contained in section 3313 a claim of this kind is excluded from that section, and that the time for the filing of such a claim is governed by section 322. Strong reliance is placed upon the legislative history of the two sections to sustain the contention. One rule for the construction of statutes is that where doubt exists as to the meaning of words used in a statute, the legislative history may be taken into consideration in resolving the doubt. Fairport, Painesville & Eastern Railroad Co. v. Meredith, 292 U. S. 589; United States v. Dickerson, 310 U. S. 554. But that is only one rule, and it may be invoked only in case of doubt, ambiguity, or uncertainty in respect of the meaning of the language used. And the plain meaning of a statute cannot be overcome by resort to the legislative history leading up to its enactment. Gemsco, Inc. v. Walling, 324 U. S. 244. There is no need to detail the extended legislative history on which the collector relies. It is enough to say that we have examined it with care and we do not think it necessarily supports the contention; and further, that it falls short of overcoming the fairly plain language used in the two sections of the statute.

Another well recognized rule lends its strength to the conclusion that the time for the filing of a claim of this kind is governed by section 3313, not section 322. The case of Huntley v. Southern Oregon Sales, Inc., supra, was decided almost eight years ago, and the later cases citing it with approval and reaching the same conclusion followed. During that period Congress convened from time to time, has enacted revenue legislation, and by section 5 of the Act of July 31, 1945, 59 Stat. 511, 523, has amended section 322, all without indicating in any manner its disapproval of the judicial interpretation placed upon the two sections. That in composite effect should be regarded as Congressional approval and adoption of the interpretation placed by the courts upon the two statutes. Sessions v. Romadka, 145 U. S. 29; Manhattan Properties, Inc. v. Irving Trust Co., 291 U. S. 320; United States v. Elgin, Joliet & Eastern Railway Co., 298 U. S. 492; Missouri v. Ross, 299 U. S. 72; Electric Storage Battery Co. v. Shimadzu, 307 U. S. 5. True, none of the cases construing the two sections was by the Supreme Court of the United States, but the rule of uniform judicial construction of a statute over a long period of

time being regarded as acceptable to the legislative arm of the government has appropriate application where legislation dealing with the general subject matter has been enacted and the particular statute has been amended, without any action or expression indicating legislative disapproval of the judicial construction, even though the construction was by circuit courts of appeal and district courts of the United States. Manhattan Properties, Inc. v. Irving Trust Co., supra.

The judgment is affirmed.

Dissenting opinion

32 HUXMAN, Circuit Judge, dissenting: I find myself unable to agree with the conclusions of my associates. I find much more difficulty in concluding than does the majority that the language of Section 322[1] clearly limits its application to so-called overpayments of income, war profits, or excess profits taxes, and that the language in Sec. 3313 clearly indicates that it governs all other applications for refunds of all internal revenue taxes, including income taxes other than so-called technical overpayments.

Sec. 3313 providing for the recovery of internal revenue taxes wrongfully collected has been a part of the Internal Revenue Code since 1872. See 17 Stat. 257. This section is Sec. 3228 of the Revised Statutes. The section sets up the procedure for filing claims for the recovery of amounts unlawfully exacted as internal revenue taxes. Almost from the beginning of the Federal Income Tax Law, the part of the revenue law providing therefor has likewise contained a section providing for the recovery of income taxes wrongfully collected. Every such section evidences a Congressional intent to remove the proceedings for the recovery of such taxes from the provisions of Sec. 3228 and regulate the right to recovery thereof by the applicable section of the income tax law. Thus, Sec. 14 (a) of the 1916 Revenue Act, providing for the right of recovery of such taxes, provides that the taxpayer "* * * shall be permitted to present a claim for refund thereof notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes; * * *." So Section 252 of the 1918 Act provides for the recovery of such taxes "* * * notwithstanding the provisions of section 3228 of the Revised Statutes, * * *." Sec. 252 of the 1921 Revenue Act contains this language: "Notwithstanding any other provisions of law, * * *".

Sec. 1316 of the 1921 Revenue Act amended Sec. 3228 by changing the period of limitation from five years to four years, and

[1] Sec. 322 is for all purposes the same as former Sec. 252. In this opinion reference will be made to Sec. 252.

made the amendment retroactive to all claims for refunds under the 1916, 1917, and 1918 Revenue Acts, with the exception that the amended act was not made applicable to income taxes. It contains this significant language: "This section, *except as modified by Section 252*, shall apply retroactively * * *."[2] Here is a clear recognition that the right to a refund of income taxes is controlled by Sec. 252.

Section 281 (a) of the Revenue Act of 1924 dealt with "overpayment" of income taxes. Section 281 (b) fixed the period within which claims for refunds must be filed. Section 1912 of the same act again amended Sec. 3228. The language of this amended section is significant. It speaks of "All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * *." It then provides that all such claims "* * * except as provided in Section 281 [which relates to income tax] * * *" must be presented. It would seem that when this section legislates with regard to all claims for taxes collected, whether erroneously assessed or collected, and then excepts from its provisions income taxes because they are provided for in Sec. 281, the exceptions being general, it meant that claims for refunds of income taxes, whether illegally assessed or collected, were provided for in Sec. 281. Construing these two sections together, it would seem logical to conclude that the word "overpayment" was used in its broad sense as meaning a payment of more than was due no matter for what cause, rather than in its narrow sense of a payment of more than was due by virtue of an error on the part of the taxpayer in filing his return.

Sec. 3228 was further amended in the Revenue Act of 1926, but again there was excepted from its provisions claims "* * * as provided in sections 284 [income tax] and 319 [estate tax] * * *"

The Act of 1928 again amended Sec. 3228 with regard to the procedure for the filing of claims for refunds of internal revenue taxes, and again it excepted from its provisions refunds for income and kindred tax payments. The language in the exception clause of the 1926 Revenue Act (except as provided in Section 284 (income tax) and 319 (estate tax)), was changed to read: "Except as otherwise provided by law in the case of income, war profits, excess profits, estate, and gift taxes." This exception no doubt was made in this form because these additional taxes had come into existence in the meantime.

It appears to me that the natural and logical conclusion to be drawn from all of this is that throughout all this time Congress

[2] Emphasis supplied.

considered and understood that claims for refunds for income, war profits, excess profits, estate and gift taxes, were especially provided for in particular sections of the revenue laws, and therefore were excluded from the provisions of Section 3228, rather than to interpret the language as though it read in substance as follows: "Except in the case of overpayment of income, war profits, excess profits, estate and gift taxes, which overpayments are provided for in Section 252."

The word "overpayment" is not a word of art, but a word having a general meaning. In general, payment may be defined as a satisfaction of an obligation by the delivery of or transfer of that which is due. So, overpayment may be defined as a payment or delivery of more than is due. Whether the payment results from an error on the part of a taxpayer in making and filing his
34 return or from erroneous assessments by the Collector when made, it is an overpayment or a payment of more than is due. Considering the language in the various Congressional enactments relating to Section 252 and 3228, it appears to me that this is the sense in which Congress used the word; that it intended that the refund of all taxes mentioned in Sec. 252 should be controlled by Sec. 252, and the refund of all other internal revenue taxes should continue to be controlled by Sec. 3228, which had been a part of the general revenue laws since 1872.

The income tax law put into force a new class of internal revenue taxes. The Revenue Act of 1921 is a general act having fourteen subtitles, relating to the collection of all internal revenue taxes. The first twelve subtitles deal with specific classes of internal revenue. It is worthy of note that of all of these, only subtitle 2, dealing with income taxes, is complete in itself. The entire Revenue Act of 1921, except subtitle 2, could be repealed and we would still have a complete statute for the assessment, levy, and collection of income taxes, including a provision for refund of amounts collected in excess of what was due. If the income tax sections of the Revenue Act of 1921 constituted a separate statute, I would have no difficulty in construing Section 252 as authorizing a refund on all amounts improperly collected.

The Treasury Department understood and construed Section 252 as controlling the refund of all amounts collected in excess of what is due. That is clearly demonstrated by the letter of Secretary Mellon to the Chairman of the House Ways and Means Committee at the time amendment of Section 252 by the Revenue Act of 1923 was before the Committee. The difficulty with Section 252, as shown by the Secretary's letter, was that it required a claim for a refund to be filed within five years from the date of the return. As the Secretary pointed out, in those cases where the final determination of an additional assessment was not made for more than

five years after the filing of the report, no claim for a refund could be filed therefor. To correct this, the Department had entertained claims for refunds for income taxes erroneously or illegally assessed if the claims were filed within the time fixed in Section 3228. The Secretary stated that the legality of this procedure was doubted by the Department. In other words, they were of the opinion that all such claims were properly to be filed under Section 252 but to afford the taxpayer relief they had entertained them if filed within the time provided for in Section 3228. The House Committee's report stated that the effect of the amendment to Section 252 was clearly shown by the Secretary's letter, and that the Committee concurred in the suggestion of the Secretary as to the need of making the law definite so a taxpayer who had by agreement with the Treasury permitted the time for the final assessment of taxes due from him to be made after the expiration of the five year period (in Section 252) will not be barred from making a claim for refund when the assessment is made and the taxpayer alleges that the assessment is illegal. This language can mean only that Congress understood that claims for the refund of income taxes illegally assessed were properly filed under Section 252. They were speaking of illegal assessments, not of technical overpayments, and were attempting to safeguard a taxpayer's right to recover them under Section 252. If Section 252 related only to so-called overpayments, then all this talk of amending the section to provide for claims for illegal assessments was out of place. This clearly indicates that not only the Treasury Department, but also the House and Senate, construed Section 252 as controlling applications for the refund of all income taxes.

In view of this, I cannot concur in an opinion that bases the decision largely on the tenuous ground that Congress having failed to amend Section 252 since the Huntley decision,[3] we must presume that its interpretation expresses the Congressional intent. The interpretation in the Huntley case is diametrically opposed to the interpretation as contained in Secretary Mellon's letter in which the Ways and Means Committee of Congress expressly concurred.

The principle of Congressional approval of judicial interpretation of its acts by failure to take further action has a place in the judicial process. But its application is not absolute and requires the exercise of sound discretion. It is founded on the principle that Congress has knowledge of these decisions, and, having such knowledge and failing to take further steps in the matter, we may presume that it concurs in such interpretation. Whether it can be said that Congress has knowledge of the decision depends upon many factors, such as the universality with which

[3] Huntley v. Southern Oregon Sales, 104 F. 2d 153.

the principle has been declared, the period of time involved, the general public interest in the particular subject, as well as the court which has decided the matter. Thus, a decision by the Supreme Court is much more likely to come to the attention of Congress than a decision by a lower court.

The Huntley opinion is the only one that has attempted an exhaustive analysis of Sections 252 and 3228. The few remaining decisions largely follow the Huntley case. It might be slightly violent to presume that any Circuit Judge had knowledge of all the decisions of the Circuit Courts dealing with various principles of law. It is much more difficult for me to presume that the Huntley decision, which is approximately eight years old and which relates to a minor detail in the administration of the income tax law, came to the attention of Congress than that it was
36 known to all the Circuit Judges, especially so since during all that time Congress was occupied with matters of greatest importance to our national existence.

For these reasons, I must respectfully dissent.

In United States Circuit Court of Appeals

Judgment

Forty-fifth Day, November Term. Tuesday, January 21st, A. D. 1947

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On February 26, 1947, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

(Clerk's certificate to foregoing transcript omitted in printing.)

37 SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed June 2, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947